obtain anticompetitive advantages." *NPRM*, para. 147. In the case of CPE, the Commission correctly decided that joint marketing requirements -- the equivalent of §251's requirement that incumbent LECs resell exchange services to competitors -- mooted this objection.[84]

Pacific Bell, like many other LECs, has provided intrastate intraLATA toll in competition with the major IXCs since 1984. The amount of traffic is significant -- about one-third of all intraLATA toll calls nationwide are placed within California.[85] We provide intraLATA toll on a fully integrated basis. The CPUC has addressed competitive issues through imputation rules and other nonstructural safeguards. Though in most cases IXCs were not permitted to advertise their intraLATA toll services until January 1, 1995, our share of the intraLATA toll market has steadily diminished. A mid-1995 study of business calling patterns indicated that Pacific Bell carried only 56% of intraLATA toll minutes (and business accounts for about 60% of all intraLATA toll calls). Since many intraLATA toll minutes captured by IXCs are not switched, but are carried to services like AT&T's MEGACOM over dedicated trunks, the actual loss is not directly measurable and may be greater.

Two other BOCs, Bell Atlantic and NYNEX, have provided interLATA services in "corridors" since divestiture.[86] Judge Greene theorized that permitting these BOCs to offer this interLATA service would give them the same incentive to impede competition as they would have in the broader interexchange market.[87] These services are also provided on a fully integrated basis. Yet there is no evidence of anticompetitive conduct. NYNEX and Bell Atlantic

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[84] See *Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies*, 2 FCC Rcd 143 (1987), *modified on recon.*, 3 FCC Rcd 22 (1988).

[85] *FCC Statistics of Common Carriers*, 1993-94 Edition, Table 2.6.

[86] See *United States v. Western Elec. Co., Inc.*, 569 F. Supp. 990, 1018-19, 1021-23 (D.D.C. 1983).

made equal access conversions as fast or faster than other BOCs. They do not charge higher prices for local exchange access than the average BOC. And they have not captured dominant, or even significant, shares of this corridor traffic. Last year Bell Atlantic estimated that its share of the interLATA corridor calls was less than twenty percent, even though its rates were 20 to 30 percent below AT&T's, MCI's, and Sprint's.[88]

F. Dominant Regulation Of The BOCs' Affiliates Would Make The InterLATA Market No More Competitive Than It Is Today, Frustrating The Intent Of Congress

For reasons we have shown above, dominant regulation of the BOCs' affiliates would not advance any legitimate purpose. It would, in fact, frustrate the intention of Congress, which was to make the long distance market more competitive.

The Commission is aware of the anticompetitive effect of dominant regulation. When it decided that certain IXCs would be treated as nondominant, it said:

> Tariff posting ... provides an excellent mechanism for inducing noncompetitive pricing. Since all price reductions are public, they can be quickly matched by competitors. This reduces the incentive to engage in price cutting. In these circumstances firms may be able to charge prices higher than could be sustained in an unregulated market. Thus, regulated competition all too often becomes cartel management.[89]

This being the case, it makes especially little sense, as the Supreme Court has recognized, to "require filing by the dominant carrier, the firm most likely to be a price leader."[90] When the BOCs' affiliates filed their dominant tariffs, IXCs would clamor their prices were too low.

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[87] 569 F. Supp. at 1018, n.142.

[88] See *Petition to Regulate Bell Atlantic as a Nondominant Provider of Interstate InterLATA Corridor Service, Declaration of Robert W. Crandall*, pp. 65, 68.

[89] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 F.C.C.2d 445, para. 26 (1981).

Whatever the BOCs' final prices, the IXCs would undercut them by only a penny or two, because that is all it would take for the established IXCs' market shares to be preserved. The BOCs' market shares would likely be minuscule. The IXC oligopoly would be preserved. The "incentive to engage in price cutting" would be dramatically reduced. Congress's will would be frustrated.

G. The BOCs' Affiliates Could Not Dominate The Provision Of In-region, International Services

The Commission tentatively concludes that it should apply the same regulatory treatment for the BOC affiliates' provision of in-region, international services as it applies for the provision of in-region, interstate, domestic interLATA services. NPRM, para. 150. The Commission also notes, however, that there is a separate process -- adopted in the agency's Foreign Market Entry Order -- that may require particular BOC affiliates to be regulated as dominant on particular routes, depending on foreign carrier affiliations. NPRM, para 151; see also 47 C.F.R. Sec. 63.18(h). There are thus two prongs to the determination of the regulatory classification of a BOC affiliate offering international interLATA services, only one of which the Commission proposes to address at this time.

With respect to the first prong, we agree that, in general, if the BOCs' affiliates are nondominant for in-region domestic services, they are certainly nondominant for in-region international services. The opposite is not necessarily true, however -- the international market differs somewhat from the domestic market in three respects, and each suggest that BOC affiliates should classified as nondominant for international interLATA services regardless of the determination made for domestic services. First, the U.S. international telecommunications

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[90] *MCI Telecommunications Corp. v. AT&T*, 129 L.Ed.2d 182, 195 (1994).

market is far more concentrated than the domestic market, with only a handful of facilities-based carriers offering services. Second, while access costs are the major expense for domestic interLATA calls, access to satellite or fiber facilities are the single biggest expense for international services. Finally, BOCs are likely to procure most of their international facilities from consortiums led by AT&T. AT&T owns a significant share of transoceanic fiber and will be their biggest competitor. These factors suggest that the BOCs have even less power in the international marketplace than they do for domestic services.

With respect to the second prong, we agree that the existing rules governing dominance based on foreign market affiliations should apply to BOC affiliates as they apply to all other international carriers. However, we note that the Commission should act to ensure that route-by-route dominance rulings, based on foreign affiliations, be concluded no later than the grant of a §271 entry petition. This could either be done by beginning the process before §271 applications are filed or streamlining any required parallel §214 filings of BOC affiliates so that the information requested is not duplicative, and any comments filed thereon are limited to foreign affiliation issues rather than matters that will be settled by this rulemaking and by the §271 entry application itself.

IX. Independent LECs Should Comply With Current Separation Requirements Until All Separate Affiliate Requirements Are Eliminated (¶¶ 153-162)

We believe the Commission's policy should be to assure that all interLATA competitors are subject to the same degree of regulation and meet the same safeguards. For the time being, this militates in favor of continuing to require structural separation for the interexchange affiliates of independent LECs to qualify for nondominant regulation.

Our region will be a magnet for competitors. California has relatively low basic rates, the lowest access charges in the nation, and therefore relatively high toll margins. As long as we must provide both in-region and out-of-region interLATA services through a separate affiliate to qualify for nondominant regulation, regulatory symmetry requires that independent LECs qualify for nondominant regulation only if they continue to offer interstate, interexchange services through separate affiliates. This would assure that all similarly situated LECs compete on the same footing. As we have pointed out above, there is no meaningful distinction in interLATA market power between BOCs and independent LECs.

X. Conclusion

For the reasons given, we urge the Commission to adopt the clarifications and policies presented above in a manner that treats the BOCs fairly in order to promote the orderly and rapid introduction of competition. Beyond that, we urge the Commission to give effect to the specific intent of Congress "to provide for a pro-competitive, de-regulatory national policy framework".

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	CC Docket No. 96-149

REPLY COMMENTS OF PACIFIC TELESIS GROUP

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SUMMARY

The purpose of the 1996 Act is to increase choices and lower prices for consumers. Some parties—those who fear competition with the BOCs—urge an over-regulatory approach that cannot be found in the Act. Congress established the safeguards it found necessary. The Commission should not bow to the anti-competitive, anti-consumer naysayers who seek in this proceeding what they could not get (for good reason) in legislation.

- ***Separation vs. integration.*** Congress struck a careful balance between the risk of cross-subsidy and the benefit of efficiency in the 1996 Act's separated affiliate requirements. Where the Act does not require separation, the Commission should not deprive consumers of the efficiencies of integration. Services that may be integrated include:
  - Telecommunications and information services authorized under the MFJ.
  - Incidental interLATA services.
  - Telemessaging services, whether intra- or interLATA.
  - Information services that do not have a BOC-bundled interLATA telecommunications transmission component, a communication that originates and terminates in different LATAs, *and* an end user interLATA benefit.
  - IntraLATA Internet access.
  - Electronic publishing not disseminated by means of the BOC's basic telephone service.

- ***Independent operations.*** Congress was clear and specific in detailing the separation requirements between the BOC and its interLATA affiliate.
  - It imposed *no* separation between the holding company, or any non-operating company affiliate, and the interLATA affiliate.
  - The Commission should not expand the phrase "operate independently" to require additional separation not required by the 1996 Act.
  - There is no statutory or policy justification to prohibit shared services, subject to the adequate safeguard of the affiliate transaction rules. Such a prohibition would deprive consumers of efficiently provided interLATA services.

- ***Nondiscrimination.*** Congress spelled out reasonable nondiscrimination safeguards in the 1996 Act. The Commission should not expand these requirements into impossible or unfair standards that would only prevent the BOCs from offering consumers the benefits of vigorous and effective competition.
  - "Nondiscrimination" does not require BOCs to provide services to others that it does not provide to its affiliate.
  - Nor does it prohibit a BOC from providing a service to its affiliate that others may not want.
  - The Commission's existing non-structural safeguards, combined with the 1996 Act's structural and non-structural requirements, are more than sufficient to implement the Act's non-discrimination provisions.
  - The privacy protections in the 1996 Act make it clear that—without discrimination—a BOC can provide CPNI to its affiliate with customer approval, and is not permitted to provide that information to others unless the customer authorizes it in writing.
  - The Commission should not regulate industry standard setting by condemning Bellcore standards or interfering with voluntary BOC attendance at standard setting forums.
  - Nondiscrimination in the timing of provisioning should be enforced by reasonable reporting of average service intervals.
  - The use of tariff rates for telephone exchange service and exchange access between a BOC and its interLATA affiliate assure nondiscrimination.
- ***Provision of interLATA facilities and services.*** The Act does not prohibit—and a policy favoring the rapid entry of new competitors in order to lower prices for consumers of interLATA services requires—that the BOC be able to provide facilities to these competitors, including its interLATA affiliate.
  - Prohibiting BOCs from providing "wholesale" facilities and services to interexchange carriers for interLATA services would give an egregiously anti-competitive advantage to the few existing large facilities-based carriers, keeping consumer prices high.
  - Official services networks may, if warranted by increased efficiency, be used to provide interLATA services and generate revenue that will benefit ratepayers.

- ***Joint marketing.*** Congress intended that consumers would be able to get "one stop shopping" from BOCs and their affiliates just as they can from other telecommunications companies. The 1996 Act clearly allows:
  - The interLATA affiliate to provide local service, with its own facilities or by resale.
  - The BOCs to market or sell their separate affiliates' services.

- ***Dominant/non-dominant classification.*** The only effect of classifying BOCs and their affiliates as dominant for in-region interLATA services would be to keep prices to consumers high because the tariff filing requirements would interfere with vigorous price competition. There is no legal or policy basis to classify BOCs as dominant.
  - The monopoly leveraging theory advanced by some parties is thoroughly discredited.
  - BOCs will have zero initial market share and zero market power.
  - Due to the pervasive unbundling and other requirements of the 1996 Act, as well as current Commission rules including price caps, the BOCs' ownership of local exchange facilities confers no market power in interLATA markets.
  - The BOCs will have no market power in international markets. Hypothetical arguments about possible arrangements between BOCs and foreign carriers should not delay BOC entry; they can be addressed in ongoing appropriate proceedings.

- ***Burden of proof.*** Any attempt to shift the burden of proof in complaint proceedings would be an illegal violation of the APA, with anti-competitive consequences.

- ***Mergers.*** Existing requirements are a sufficient safeguard against discrimination by BOCs involved in merger agreements. There is no need or justification under the 1996 Act to treat the regions as merged before a merger becomes final.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	CC Docket No. 96-149

REPLY COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("PTG") hereby respectfully submits its reply comments in the above-captioned proceeding.

I. Introduction

The Commission intends, through this docket, "to protect subscribers" and "to protect competition." *NPRM*, ¶3. It does not plan to protect *competitors*. Yet this seems to be precisely what many supposedly pro-competitive commenters are urging. Major carriers, such as AT&T, MCI, and Sprint urge the Commission to handicap the Bell Operating Companies ("BOCs") as they enter interLATA markets. They seek to deprive the BOCs and their interLATA affiliates of efficiencies, such as sharing administrative services, which Congress clearly did not want to restrict. They urge uneven application of the joint marketing requirements, directly contradicting Congress's intent that BOCs and

their affiliates should enjoy parity with other carriers in such vitally important matters as the ability to offer "one stop shopping." They recommend treating BOC affiliates as dominant for in-region, interLATA services, despite those affiliates' zero initial market share and pervasive regulation and unbundling of the local exchange. They would impose an illegal burden of proof on BOCs in complaint proceedings which could lead to regulatory blackmail.

These arguments are not pro-subscriber nor pro-competitive. They are naked attempts to preserve the comfortable status quo in interLATA competition, where a few major facilities-based carriers enjoy year after year of record profits. These carriers don't want the BOCs to compete. This is clear. Prices to subscribers might fall; consumer choice might expand. How would that benefit AT&T? Or MCI? Or Sprint?

Congress *did* want the BOCs to compete in interLATA markets. Congress wanted us to lower prices to subscribers through our efficiencies. Congress wanted us to market and sell our services aggressively and effectively. Congress wanted us to be treated fairly in Commission proceedings. In our Reply, we highlight the important issues where our future competitors and Congress disagree. We urge the Commission to follow Congress.

II. The Commission Should Reject Proposals that Would Broaden the Scope of §272 and Frustrate Congress's "Pro-Competitive, Deregulatory" Goals (¶¶ 31-54)

A. *The Commission Should Reject Proposals To Require Separation Where Congress Allows Integration*

Prior authorized and incidental interLATA services—MCI (p. 8), Sprint (p. 14), and CompTel (p. 10) are correct that §272 structural separation requirements do not apply to previously authorized telecommunications services. MCI, for instance, states that "it appears that previously authorized interLATA telecommunications services never have to comply with the separate affiliate requirements of §272."

TRA (pp. 9-10) takes the extreme position that prior authorized interLATA *telecommunications services* are not protected from §272 structural separation requirements. TRA's unjustified position is directly contrary to the §272(a)(2)(iii) exclusion of "previously authorized activities described in section 271(f)" from the interLATA telecommunications services for which separate affiliates are required. TRA's focus on interLATA CMRS is misplaced.[1] Section 271(g)(3) includes commercial mobile services as incidental interLATA services, and §272(a)(2)(B)(i) excludes those services from the separate affiliate requirements.

MCI (p. 9), Sprint (p. 14), and ITAA (p. 8) are wrong when they state that previously authorized or incidental interLATA *information services* must comply with separate affiliate requirements within one year. Their only basis for this argument is that §272(a)(2)(B), which excludes incidental interLATA services relates to "telecommunications services," not information services. Congress, however, did not limit that subsection to telecommunications services. Information services are included in both the previously authorized activities excluded from separate affiliate requirements by §272(a)(2)(B)(iii) and the incidental interLATA services excluded from those requirements by §272(2)(B)(i). For instance, the incidental interLATA services include "Internet services over dedicated facilities to or for elementary and secondary schools...." §271(g)(2). Internet services are enhanced or information services. As another example, incidental interLATA services include "other programming services" as well as the capability of interaction by subscribers. §271(g)(1)(A) and (B). Congress intended that "other programming service" would include "interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced service*." Conference Report, p. 169 (emphasis added). The inclusion of information services within the exceptions from separate affiliate requirements for

[1] The FCC has recognized the need to allow BOCs to integrate PCS. *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, para. 126 (1993).

telecommunications services is reasonable here because, as §271(h) states, the incidental InterLATA services include incidental "interLATA transmissions." Incidental interLATA transmissions are common to both interLATA telecommunications and interLATA information services. Moreover, the MFJ Court had no unique rules for authorizing incidental interLATA information services as opposed to incidental interLATA telecommunications services and handled them both together.

For the same reasons, NCTA (pp. 2-7) and Time Warner (p. 4) are wrong to attempt to use §271(h) to apply §272 restrictions to BOC video services. Video services are included in the §271(g) list of incidental interLATA services that are excluded from separate affiliate requirements by §272(a)(2)(B)(i). In addition, application of §272 restrictions would prevent the BOC from providing integrated video services, contrary to Congress's intent under §651.

Avoiding restrictions on incidental interLATA services—MCI (p.11) is clearly wrong in its extreme recommendation that *structural separation* should be required for incidental interLATA services. By explicitly excluding these services from the requirements of §272, Congress expressed its intent to avoid these requirements. As it did with open video systems, the Commission should "adhere to Congress's intent and decline to impose a separate affiliate requirement here."[2] Moreover, for ten years under *Computer III,* the Commission has consistently found that regulations short of structural separation provide sufficient protection, while allowing the public the efficiency benefits of integration of BOC services.[3] Nothing has happened that could change these findings.

In addition, AT&T (p. 11) is wrong when it argues that the *nonstructural nondiscrimination obligations* of §§272(c) and (e) should apply to a BOC's integrated provision of incidental interLATA services. As we explained in our Comments (pp. 6-7),

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[2] *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* CS Docket No. 96-46, FCC 96-249, *Second Report and Order,* released June 3, 1996, para. 249.

[3] *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services,* CC Docket No. 95-20, 10 FCC Rcd 8360, para. 29 (1995) ("*CI-III Further Remand NPRM*").

no non-accounting "structural or nonstructural" safeguards are needed to ensure that BOC provision of incidental interLATA services does not harm ratepayers or competition. Price cap regulation, which divorces prices from regulated costs, or accounting safeguards provide adequate protection.

Merger agreements—AT&T (p. 15), Sprint (p. 15), Excel (p. 3), and CompTel (p. 12) are wrong that, pre-merger, the regions of those BOCs that have entered merger agreements should be considered a single "in-region" for purposes of §§271 and 272. Merger agreements fall apart for many reasons, and it makes no sense to treat these agreements as final until they are final. Moreover, merger agreements do not diminish the application of the §§271 and 272 separate affiliate and nondiscrimination requirements, or other existing nondiscrimination requirements, and they are sufficient to protect ratepayers and competition.

B. *The Commission Should Reject Proposals that Would Require It To Ignore Its Decades of Experience with Enhanced Services*

Definition of interLATA information services—AT&T (p. 14) is correct that "an information service is not interLATA merely when it can be accessed from outside the LATA in which the computer facility is housed...." The Commission must reject Sprint's (p. 18) and TRA's (pp. 11-12) contrary arguments. Clearly the Commission also must reject arguments that do not even rely on potential interLATA transmission. These include Voice-Tel's (p. 12) argument that all information services should be arbitrarily declared to be interLATA, and ITAA's (pp. 11-12) similar argument that BOCs should provide all information services only through separate affiliates. These approaches were never adopted in the past by the FCC or the MFJ Court, were not adopted by Congress, and should be rejected.

Mere potential to be interLATA, or a party's desire that a service be treated as interLATA, cannot make a service interLATA. If it could, there would be no intraLATA services, which would mean that BOCs could not have been providing service all these years.

In order to be interLATA, the service must involve a bundled interLATA telecommunications transmission component selected or provided by the BOC. Even that provision does not, by itself, make it interLATA. Necessary factors include whether the communication originates and terminates in different LATAs, and whether the end user consumer receives an interLATA benefit.

InterLATA information services involve actual, specific point-to-point communication, with the point in each LATA chosen by the end user for its own benefit.[4] If a BOC chooses a point in another LATA for placement of transmission or information service equipment, in order to make the service more efficient for the BOC, that does not make the service interLATA.

End-to-end interLATA service vs. BOC interLATA service—AT&T confuses the nature of the end-to-end communication for purposes of jurisdiction (*e.g.*, an *interexchange access service* is subject to FCC authority if the end-to-end communication is interstate) with the question of whether the BOC or BOC affiliate itself is providing an interLATA or intraLATA service. Accordingly, AT&T (p. 13) is wrong when, in the context of §§ 271 and 272, it states that an "information service is interLATA whenever interLATA transmission or *interLATA access* is a component of the service...." (emphasis added.) If providing interLATA access made a BOC service interLATA, the BOCs currently would not be able to provide interexchange access services.

MFJ waiver request—AT&T (n.16) is mistaken when it asserts that the Commission can "presume that if an MFJ waiver was previously sought or granted for the provision of a particular information service, that service is an interLATA information service." A waiver request may or may not relate to the service being an interLATA information service subject to §272. Prior to 1991, the information services prohibition

[4] The same principles apply to both telecommunications and information services. Section 3(21) of the 1996 Act defines "interLATA service" as "telecommunications between a *point* located in a local access and transport area and a *point* located outside such area." "Information service" means "the offering of a capability for generating, ... or making available information via telecommunications...." §3(20). "Telecommunications" is "the transmission, between or among *points specified by the user* of information.... §3(43). (emphasis added.)

required a waiver before a BOC could provide any information service, whether on an interLATA or intraLATA basis. Moreover, waivers that the MFJ Court granted did not necessarily require a separate affiliate. In addition, BOCs sometimes requested waivers because of uncertainty of the meaning of the Court's orders, without any admission that waivers were actually needed.

Internet access—Like AT&T, MFS (pp. 11 and 17) confuses the question of whether the end-to-end communication is interLATA with the question of whether the part of the communication provided by the BOC is interLATA. Accordingly, MFS (pp. 6-26, and 28) is wrong in arguing that Internet Access is always interLATA information service. MFS's (p. 17) tortured argument shows that it will go any length to stop BOC competition. MFS states: "[E]lectronic publishing is defined to *exclude* the services that are traditionally thought of as Internet services, including gateway services, e-mail, and navigational systems. Thus, by implication, the information services excluded from the definition of electronic publishing must be the types of services for which Congress intended to include in the broader collection of information services that require a separate subsidiary." (emphasis in original) This argument is nonsensical. If Congress wanted intraLATA Internet access services to be in a separate affiliate, it would have created a separate affiliate requirement for them.

Pacific Bell Internet ("PBI"), a subsidiary of Pacific Bell, provides Internet access service, without providing interLATA service. PBI sent out a "Notice For Interconnection" to the entire interexchange industry seeking carriers interested in offering their interLATA service on a complementary basis with its intraLATA service. When end users sign up for PBI's service, PBI explains that it does not provide interLATA service, but that they may choose to use an interexchange provider that has agreed to provide it, or may ask any other interexchange carrier to inform PBI that they wish to provide it.

MFS (p. 18) also is wrong in saying that Pacific Bell did not file with the FCC concerning Internet access. Pacific Bell filed amendments to its CEI plans for both videotex gateway services and electronic messaging services in order to expressly include

Internet access, and filed reply comments.[5] The FCC expressly addressed Pacific Bell's Internet access service, rejected arguments against it, and approved it.[6] The Commission expressly determined that Pacific Bell was correct to amend its CEI plans because "Pacific Bell's Internet access offering represents an application in which videotex gateway and electronic messaging services converge."[7]

Existing requirements—Some parties argue that existing unbundling and interconnection requirements of *Computer II*, *Computer III*, and *ONA* are inconsistent with or insufficient to implement §272 requirements for interLATA information services. We discuss in Part IV below why these parties are wrong and why the existing requirements are more than what is needed to implement §272.

C. *The Commission Should Reject Proposals That Would Fail To Respect the Different Regulatory Treatment that Congress Afforded Different Categories of Information Services*

Electronic publishing services—MCI (p. 21) is wrong that "a financial or proprietary interest" in the content of the information is enough, by itself, to make the service electronic publishing. We explained in our Comments (pp. 14-15) that "control" or a "financial interest" in the content of information is a necessary attribute of electronic publishing services, but is insufficient by itself to make a service an electronic publishing service.

MCI (p. 22) is correct that "[s]ome notion of electronic transmission is instinct throughout the 1996 Act; otherwise the Act would be rendered entirely meaningless." See §274(a). As YPPA (p. 4) explains, in order to be electronic publishing subject to the restrictions of §274(a) there must be both control of the information and dissemination via transmission over the BOC's, or its affiliate's, "basic telephone service." Use of the BOC's unbundled network elements in a service provided by another carrier is

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[5] *See Bell Operating Companies Joint Petition for Waiver of Computer II Rules,* 10 FCC Rcd 13758, paras. 59-67 (1995).

[6] *Id.*

[7] *Id.*

not sufficient. In addition, the service must fit the definition of an information service, including the BOC's generation or alteration of the content of information of the types listed in, and not excluded from, the electronic publishing definition.

Contrary to ITAA's assertions (pp. 15-16), the extensive §274(h) definition of electronic publishing services draws a clear distinction between these services and other information services. In fact, the definition expressly excludes large groups of information services, including gateway services and electronic mail services. Accordingly, ITAA's recommendation that electronic publishing services and information services be treated as one and the same must be rejected as contrary to Congress's intent.

Telemessaging services—MCI (p. 21) and Sprint (n.12) are mistaken in their arguments that telemessaging services should be treated as information services under §272. Sprint demonstrates the fallacy of this argument by saying that "all" telemessaging services should be treated as information services. That would include live answering services, which may lack any of the qualities required in the definition of information services.[8] Congress provided separate regulations for telemessaging services. These services should not also be regulated as interLATA information services. Allowing voice mail and other telemessaging services to be offered on an integrated basis is sound public policy, as evidenced by the benefits that integration of these services has provided consumers.

III. The Operate Independently and Separate Employees Provisions Do Not Require the Imposition of Requirements and Restrictions Not Imposed by Congress (¶¶ 57-60, 62)

A. "Operate Independently" Provides Guidance for Implementing the Other §272(b) Requirements

Many commenters (*e.g.*, AT&T, pp. 19-24; MCI, pp. 23-27; Sprint, pp. 20-25; Time Warner, pp. 17-18; Excel, pp. 4-8; NJ DRA, pp. 2-6) recommend that the Commission use the §272(b)(1) requirement that a BOC's interLATA affiliate operate

[8] AT&T makes this same mistake. AT&T, n.13.

independently from the BOC as a hook on which to hang a wide variety of additional requirements and restrictions. Nothing in the 1996 Act suggests that Congress intended the Commission to add to the requirements that Congress imposed between BOCs and their separate affiliates. If Congress did not believe that the requirements it specified were adequate, it could have added others, as it did in §274, or it could have required the Commission to prescribe additional requirements, as it did in §276. Congress did neither. Instead, it carefully specified a set of requirements to apply between BOCs and separate affiliates under §272.

It is not necessary for the Commission to add requirements to §272 to give effect to the independent operation requirement. That requirement provides a focus, or purpose, in interpreting and implementing the other §272(b) provisions. It tells the Commission and the BOCs why the other provisions were put in place, and how to resolve issues that arise in implementing those other provisions.

The phrase "operate independently" is not new. It appears in the *Computer II* and cellular rules.[9] The Commission has not used it to impose additional requirements in those situations, and the Commission need not do so here. The Commission should consider the motives of those advocating the imposition of additional restrictions and requirements on the BOCs. Congress intended to create competition in the provision of interLATA service. The commenters seek to thwart that intention. The Commission should focus on the desires of Congress, not the anticompetitive desires of the commenters.

If the Commission decides, despite Congress' intentions, to add restrictions and requirements, it should not go further than those imposed in the *Competitive Carrier*[10] proceeding. Those safeguards, combined with the provisions of the 1996 Act, will provide more than sufficient protection against any perceived concerns arising from the existence of a separate affiliate providing interLATA services.

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[9] 47 C.F.R. §64.702(c); 64 C.F.R. §22.903(b).

[10] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 FCC 2d 554, (1983) (*Fifth Report and Order*).

B. The 1996 Act Does Not Prohibit Shared Services

Several commenters (AT&T, pp. 24-26; ITAA, p. 19; MCI, pp. 27-28; TIA, pp. 26-27) agree with the Commission's tentative conclusion regarding sharing of services by a BOC and its separate affiliate. They are wrong, and the Commission should rethink its tentative conclusion. Section 272(b)(3) requires the BOC and the separate affiliate to have separate officers, directors, and employees. It says nothing about shared services, and certainly does not prohibit shared services. The 1996 Act anticipates that there will be transactions between the BOC and the separate affiliate and provides guidelines for those transactions. §272(b)(5). The Commission's affiliate transactions rules provide further protection against improper cross-subsidies. No commenter provided any sound rationale for imposing a restriction on shared services that Congress did not impose.

Sharing services is not the same as sharing personnel. A BOC can provide services to itself and all of its affiliates, including a separate affiliate, using the BOC's employees, without sharing those employees with the affiliates. The BOC would charge the affiliates for the services provided, according to long-established and effective affiliate transactions rules. The *Computer II* rules permitted sharing of services, and no commenter identified any situation in which the sharing of services under those rules caused improper discrimination or cross-subsidy.[11] Until they can do so, there is no reason for the Commission to even consider imposing restrictions on the sharing of services.

There is even less basis for any restriction on a holding company or other affiliate from providing similar services to a BOC and a separate affiliate, as suggested by

[11] CCTA alleges that a NARUC audit of Pacific Telesis uncovered instances of cross-subsidization of competitive services, and that Pacific Bell failed to specify payment costs in its recent revisions to its Cost Allocation Manual ("CAM"). These allegations are not new -- CCTA has raised them before and we have addressed them. The NARUC audit report was filled with misinterpretations and outright errors. We showed in our response to the audit report that the accusations were either unfounded, or were extremely minor problems that have been corrected; in no case did the report identify any harm to Pacific Bell's ratepayers. *See Pacific Telesis Group's Response To The Draft Affiliate Interests Audit Report*, July 7, 1994. We also responded to CCTA's meritless allegation about our CAM. Pacific Bell's CAM fully complies with the Commission's rules. *Proposed CAM Revisions of Pacific Bell*, AAD 96-46, *Motion To Strike CCTA's Improper Reply Comments or In The Alternative To Accept Pacific Bell's Reply Comments*, AAD 96-46, filed June 20, 1996.

AT&T (p. 25), Sprint (p. 24), and Time Warner (pp. 19-20). Section 272 applies only between the BOC and the separate affiliate, and the definition of BOC does not include the holding company or other affiliates. The 1996 Act simply does not impose restrictions on other relationships within a corporation.

IV. The Commission Should Reject Proposals To Apply the Nondiscrimination Requirements Contrary to the Way Congress Established Them (¶¶ 65-89)

A. *The Nondiscrimination Provisions Require that the BOCs Provide Service, Not Guarantee an Outcome, in a Manner that Avoids Unreasonable Discrimination*

Nondiscriminatory provision of service—AT&T (p. 31) is wrong that "any failure by a BOC to achieve identical outcomes should be treated as *prima facie* evidence of discrimination." Sections 272(c)(1) and (e) do not require a BOC to provide a requesting entity with an identical outcome to that provided to its affiliate, where this would require the BOC to provide services to the requesting entity that are different from those provided to the affiliate. Ensuring equality of the end result on the other carrier's network would be impossible to do and to enforce. Unlike virtual collocation which involves a more narrow set of requirements, a general requirement that BOCs adjust services and processes for each carrier's order would raise infinite possibilities. The BOCs cannot be held responsible for the particular characteristics of other entities' networks and adjust all BOC processes and network characteristics accordingly. Although BOCs help requesting entities meet their needs, it is the requesting entities' responsibility to engineer their interconnection needs, based on sizing of trunk groups and signaling links, and based on their network architecture and customer base. For instance, if a carrier with many customers orders one small trunk group, some of its customers' calls probably will be blocked, whereas a carrier with few customers may suffer no blockage with the same trunk group. BOCs cannot guarantee the same end result, but must treat their affiliates the same as similarly situated third parties. As AT&T (pp. 32-33) appears to admit, if the other entity wants something different than the BOC's separate affiliate wants, the other entity

should request something different, not try to force the BOC to figure out what the entity needs to get the same end result as the affiliate. AT&T's argument is convoluted since, after arguing that what matters is an identical outcome, not identical treatment, it argues that "'at minimum, ... BOCs must treat all other entities in the same manner as they treat their affiliates....'"

MCI (pp. 31 and 36) makes the same mistakes concerning the nature of the nondiscriminatory provision of service.[12] Moreover, MCI's (p. 37) goal clearly is to frustrate the BOC affiliates' abilities to innovate by urging the Commission to presume that any service a BOC affiliate wants that non-affiliates do not want is discriminatory.

Reasonable discrimination—MCI (p. 34-35) and Voice-Tel (pp. 13-14) are mistaken in their arguments that Congress intended to impose a stricter standard of compliance in §272(c)(1) than in §202. Unlike §251, which solely places obligations on LECs and others, §272 balances Congress's desire to protect ratepayers and competition with its desire to let BOCs into new businesses for the benefit of consumers. Thus, it is appropriate that §272 allows both regulators and BOCs more flexibility than §251.[13] They may continue to make distinctions among entities and services so long as disparate treatment is reasonable under the circumstances and BOCs offer similarly situated customers the same treatment.

No new regulations are needed to ensure against unreasonable discrimination. All the FCC's existing mechanisms continue in effect, including tariffing, comparably efficient interconnection, equal access, and others. How to apply these mechanisms in particular cases must be considered on an *ad hoc* basis.

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[12] Sprint (pp. 35-36) and TRA (pp. 15-16) also are wrong on this subject.

[13] MCI's position would result in §272 having a stricter standard than §251. MCI states that "differences in cost to a BOC would not appear to be relevant in assessing whether it must offer IXCs the same facilities and services on the same terms and conditions as it offers its affiliate." MCI, p. 35. In Docket 96-98, the FCC found that cost differences could be reflected without creating discrimination under §251. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, released August 8, 1996, para. 860.